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Supreme Court, U.S.
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Supreme Court of the United States

October Term, 1960

No. 377

CHISHOLM-MOORE HOIST CORPORATION,
Petitioner,

against

WILLIAM CARLSON,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Supreme Court of the United States

October Term, 1960

No. 377

CHISHOLM-MOORE HOIST CORPORATION,

Petitioner,

against

WILLIAM CARLSON,

Respondent.

Questions Presented

Respondent submits that the following questions more accurately reflect those herein involved:

1. Did the District Court abuse its discretion in admitting technical, material expert opinion testimony concerning the cause of the accident, which discretionary ruling was approved by the Court below?

2. Did the District Court abuse its discretion in admitting expert testimony of a possible defect in the machine involved in the accident by showing the defect in a similar machine, which discretionary ruling was again approved by the Court below?

Statement of Facts

Respondent submits that the statement of facts set forth by the Court below and its comments thereon more fully disclose the state of the record.

"This action was brought in the District Court for the Southern District of New York by Carlson, a citizen of

Texas, against defendant, a New York corporation, to recover for an injury suffered in Texas, and allegedly caused by defendant's negligent manufacture of a chain hoist. * * *

Carlson was employed as a millwright by the Austin Company in Houston. On the morning of April 20, 1950, he was engaged, along with several co-workers, in inserting heavy pistons into the cylinders of a large machine press. Each piston was brought to 'working distance' of the press by a large overhead crane. In order to achieve the delicate control over the piston necessary for the final installation, the workers would then attach a chain hoist to the crane. The basic physical principle of the hoist is that of the lever. An external wheel, manipulated by an attached chain, turns a set of gears, which turn another wheel to which the load is attached by another chain. When one pulls on the hand chain so as to cause the hand wheel to move in one direction the load is raised, and in the other direction, lowered. In the so-called one-ton hoist here involved, which in fact is geared to handle loads of 3,000 pounds, the hand chain has to be pulled about three feet to move the load one inch. Unlike a simple block and tackle, the chain hoist also contains a braking device, so that when the operator ceases to pull on the hand chain, the very weight of the load forces a friction disc attached to the hand wheel against another friction disc and prevents further motion of the load.

The piston involved in the accident had a diameter of twelve inches throughout most of its length of 30 to 36 inches and weighed about 2,200 pounds. On the day of the accident twelve similar pistons had been installed by use of a hoist with 'a long pull chain'. When the time came to install the thirteenth piston, one of Austin's employees removed from a packing crate a new one-ton aluminum hoist manufactured by defendant; this had a shorter chain. The hook at the end of its load chain was affixed to an

eyebolt which had been screwed into the head of the piston. Plaintiff's witnesses testified, without contradiction, that chain hoists required no preliminary adjustment or testing and that it was customary to put them to use just as they came from the packing crate.

Carlson was stationed on some scaffolding adjacent to the steel die or table, to which the piston was to be lowered from about twenty inches above. Upon a signal from him and another member of the crew, the hoist operator pulled the hand chain in the down direction for about three feet. At that moment Carlson's hands were resting on the die directly under the piston, he being engaged in wiping some grease and foreign matter from the surface of the die; if the hoist had been working properly, the twenty-inch descent would have taken several minutes and Carlson would have had ample time to complete this task. Instead the piston fell the entire twenty inches to the die and landed on plaintiff's left thumb and his right thumb, index finger, and middle finger. All these eventually had to be amputated in major part.

The piston was removed from Carlson's hand by the overhead crane. That this could be done ruled out the possibilities that the accident was caused by some defect in the attachment of the load chain to the piston or in the crane itself. Examination of the hoist revealed that the load chain was entirely paid out; what had fallen was the load chain and the attached load. It was undisputed that if the hoist had been functioning properly, the operator could not have caused the abrupt fall by improper manipulation of the chain.

The record is not altogether clear as to what happened next. Defendant read in evidence a deposition by Green, construction superintendent for the Austin Company, in which Green said that, having first ordered an ambulance from his office, he arrived at the scene of the accident three to five minutes after its occurrence; that the piston was

still hooked to the hoist—'Whether the piston was up or down I wouldn't say'; that he operated the hoist to raise and lower the piston, which it did successfully; and that he then had the hoist taken to his office where it remained for three or four days until he sent it out for testing. Plaintiff's witness Merriman, the signalman of the crew, testified that, after having arranged for the crane to remove the piston from Carlson's hands, he ran down to see Carlson, then busied himself looking for the ambulance, and, when he next saw the hoist, 10 or 15 minutes after the accident, found it lying on the ground, disassembled with Cannon, the Austin Company's general foreman, and Griffith, the night foreman, standing over it and with Cannon holding a friction disc. This disc bore some black marks, which Merriman termed 'a heat or what we call in our trade a guard mark', caused by 'intense friction or heating being applied'. Clearly Merriman's and Green's testimony cannot be wholly reconciled.

Having sought to negate all causes of the accident other than a defect in the hoist, plaintiff endeavored to indicate what the defect might have been. Merriman was allowed to testify, over an objection, * * * that if the elastic nut which held the hand wheel on the central shaft of the hoist were loose, the two friction discs would not hold the full capacity of the load, and that he had seen other hoists in which a cotter pin had been inserted behind the nut to prevent such slippage. Stewart, a consulting engineer, corroborated this. In addition, he had examined the friction discs and found that each showed heavy black circles of resinous material; this he said, was the result of the release of a bonding agent induced by heat generated by friction, 'a dynamic type of braking operation * * * indicative of the development of a brake fade situation' which would cause slippage. Stewart also advanced an alternative theory. On the basis of examination of the braking mechanism of another hoist of the same model, he concluded there was a possible defect in the ratchet, a circular

wheel having teeth, and in the pawl, a tongue like strip that fitted into the teeth. When the hand wheel was turning in the up direction he detected a tendency for the tip of the pawl not to slip into one of the teeth but rather to get hung up on the end of the wheel. He said that then the heavy downward pressure of the load would cause the ratchet to reverse itself and begin to move rapidly in the other direction and that the friction discs, designed for static braking, might be insufficient for such a dynamic braking situation.

In addition to the deposition of Green as to his successful operation of the hoist immediately after the accident, defendant's case was as follows: Shilstone, the engineer to whom Green sent the hoist for testing, described extensive operating tests he had made and said that at no time did the hoist malfunction in any degree. Cotesworth, defendant's service manager, testified that the hoist was received back from Texas in December, 1950; that he examined it in April, 1951; that the hoist operated properly; that he opened the hoist and found it 'in good condition', although what he called the 'washers', which we take to be what other witnesses called the friction discs, 'were encrusted with black scale and showed uneven braking surfaces'. Defendant sought to counter plaintiff's evidence with respect to the nut by testimony of its chief engineer that if a substantial amount of weight was on the load chain, the hand wheel would be forced against the friction discs regardless of how loose the nut was; this was corroborated by tests run by another engineer in defendant's employ. The chief engineer also testified that the type of elastic nut which defendant employed was in standard use, and that the small size of the shaft would make it difficult to install a cotter pin of adequate size. The same witness sought to counter Stewart's ratchet and pawl theory on the basis that the ratchet and pawl are part of the operative mechanism only when the load is being raised rather than lowered; however, the witness con-

ceded on cross-examination that safe operation demanded that the ratchet be stationary on the downward pull, although he went on to say that if for some reason the pawl was not inserted in the ratchet at the beginning of the downward operation or had popped out, this still could not account for such malfunctioning as here occurred.

Defendant sought also to explain how the accident could have happened if there had been no defect in the hoist. It suggested that if the fastening at the upper end of the piston was not an eye but a hook (or an eye which had opened so as to be a hook)—a possible, though highly dubious, inference from some language in Merriman's testimony which he later disclaimed—this hook might have become entangled with the slack portion of the load chain, thereby transferring the weight and depriving the braking mechanism of any force, so that the load would drop as soon as the operator released the hand chain. However, cross-examination showed that the physical relationship between the fastening and the slack part of the load chain made such a transference impossible * * *. * * *. If the evidence did not utterly exclude maltreatment of the hoist after it had left defendant's factory, improper fixation of the hoist to the crane, faulty manipulation by the hoist operator, malfunctioning of the crane, or a defect in the eyebolt or its attachment, there was at least a vast preponderance in plaintiff's favor. * * * Plaintiff demonstrated that undue friction and consequent slippage had occurred within the hoist and suggested two possible reasons why—slippage of the nut, permitting an inference that this had been ill designed or installed, and defect in the ratchet and pawl, permitting an inference of negligence in design, choice of materials or inspection; and the jury could properly have believed plaintiff's rather than defendant's witnesses as to the causal relation of these alleged defects to the accident. * * *"

Argument

Petitioner now concedes that there was sufficient evidence to submit the case to the jury. This petition is therefore concerned solely with the narrow question of admissibility of the following testimony, clearly within the discretion of the Trial Judge and which was held to be correct by the Court below.

I

The expert witness, also an eyewitness, was asked his opinion as to the cause of the accident based upon his experience and what he actually saw and, over petitioner's objection, stated:

> "In my opinion if this nut had been loose on the chain wheel, and this hoist had slacked in, the two friction discs would not hold the full capacity of this load. It would slip. It would turn loose." (pp. 175-176)

The objection by petitioner's counsel was directed to the witness' qualifications and that the answer "would be purely conclusion on his part as well as speculation" (175).

The Court of Appeals, affirming the Trial Judge, held the testimony clearly admissible under the authority of *Transportation* v. *Hope*, 95 U. S. 297. That decision by this Court in 1877 has been consistently adhered to by this Court and cited by the Courts of Appeals throughout the nation as the proper rule of admissibility of expert opinion evidence for the last 83 years, both prior to and since the promulgation of Federal Rule 43(a), even when it was the ultimate issue to be decided by the jury. *Union* v. *Smith*, 124 U. S. 405, 423; *Texas* v. *Watson*, 190 U. S. 287, 291; *Meredith* v. *United States*, 238 F. 2d 535, 543; *Millers'* v. *Wichita*, 257 F. 2d 93, 100; *Frankfeld* v. *United States*, 198 F. 2d 679, 689; *Lobel* v. *American*, 205 F. 2d 927, 931; *Mutual* v. *Frost*, 164 F. 2d 542, 548 (citing in support of the

rule, *Clark* v. *Baird*, 9 N. Y. 183; *Bearss* v. *Copley*, 10 N. Y. 93; *Harris* v. *Panama*, 36 N. Y. Super. 373; *Jackson* v. *New York*, 2 Thomp. & C. (N. Y.) 653; *Moore* v. *Westervelt*, 9 Bosw. (N. Y.) 558; *Price* v. *Hartshorn*, 44 N. Y. 94 and *Walsh* v. *Washington*, 32 N. Y. 427); *Detroit* v. *Banning*, 173 F. 2d 752, 756; *Travelers* v. *Drake*, 89 F. 2d 47, 49; *Ekblom* v. *Reed*, 71 F. 2d 399, 400; *New York* v. *Doerksen*, 64 F. 2d 240, 241; *Cropper* v. *Titanium*, 47 F. 2d 1038, 1043; *Svenson* v. *Mutual*, 87 F. 2d 441, 445; *Swarts* v. *Wilson*, 115 A. D. 739, aff'd 193 N. Y. 623; *German* v. *New York*, 103 A. D. 310, aff'd 185 N. Y. 581.

Admittedly, Rule 43(a) of the Federal Rules[1] governs the question of admissibility of evidence in the federal forum. The Rule holds admissible all evidence admissible (1) pursuant to federal statute (not applicable herein);

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[1] Rule 43(a) is an effort to liberalize the rules of admissibility of evidence, in accordance with the modern trend to admit into evidence any testimony which throws light on a controversy. *United States* v. 25,406 *Acres*, 172 F. 2d 960, cert. den. 337 U. S. 931. The Trial Court has been given great latitude and discretion in determining questions of admissibility of evidence, *Norwood* v. *Great*, 146 F. 2d 797, not to be disturbed except for abuse thereof, *Chicago* v. *Beecher*, 150 F. 2d 394, cert. den. 326 U. S. 781; *Minnehaha* v. *Kelley*, 150 F. 2d 356. Doubts must be resolved in favor of admissibility, *Mourikas* v. *Vardianos*, 169 F. 2d 53; *New York* v. *Schlatter*, 203 F. 2d 184; *National* v. *Levy*, 126 F. 2d 33, cert. den. 316 U. S. 697. The rule favoring admissibility extends even to those matters where the state rule favors exclusion when the federal rule permits admission, *Boerner* v. *United States*, 117 F. 2d 387, cert. den. 313 U. S. 587; *Chicago* v. *Beecher*, 150 F. 2d 394, cert. den. 326 U. S. 781; *Garford* v. *Mann*, 163 F. 2d 71; *Pollack* v. *Metropolitan*, 138 F. 2d 123; *Peoples* v. *Travelers*, 151 F. 2d 437; *Aetna* v. *McAdoo*, 106 F. 2d 618; *Peoples* v. *Fitzgerald*, 188 F. 2d 198.

Thus—there is only the need to determine whether the federal rule favored the admission of Merriman's testimony since a state exclusion rule was inferior thereto. As stated by the Court below and further hereinabove set forth, the various Federal Courts have firmly established the rule of admission of testimony of the nature herein involved.

(2) under a rule of evidence applied in Federal Court in equity hearings, and (3) under state rules of evidence. The Court below correctly held Merriman's testimony admissible under the second clause.[2]

The well established rule of *Transportation* v. *Hope*, 95 U. S. 297, *supra*, was adjudged to be one which would be applied in equity. The determination by the Court below was grounded on settled, long standing principles of law. The cases cited by petitioner on page 7 of its petition[3] neither restricted the rule nor raised any doubt of the applicability of the doctrine of *aequitas sequitur legem*, equity follows the law, permitting transposition of the rules of law into rules applicable in equity hearings. Thus—*Transportation* v. *Hope*, *supra*, was a rule of evidence equally applicable in United States Courts at hearings of suits in equity.

Equity opinions have held common law rules of evidence concerning qualification and opinion evidence of

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[2] The Court did not reach the question as to whether it was also admissible under the rules of evidence applied in New York Courts.

[3] *Cereste* v. *New York*, 231 F. 2d 50, involved admissibility of evidence where state law also favored admission. The concurring opinion by Judge Waterman expressed no doubt as to the Rule's applicability, arriving at the same conclusion as did the Court below herein—that rules of evidence at law permitted a court to arrive at a determination of admissibility grounded under the Rule's equity clause. In *Schillie* v. *Atchison*, 222 F. 2d 810, the Court did not state that there was a question open concerning the applicability of Rule 43(a), only that the application of the rule of evidence was not free from difficulty.

Palmer v. *Fisher*, 228 F. 2d 663, involved the question of competency to testify where forbidden by state statute as a confidential privilege and no federal rule favoring competency was shown. *Cross* v. *Young*, 267 F. 2d 725, held that *only* in absence of a claim that the federal rule of evidence was different than the state rule would the latter apply. *Ryan* v. *Adam*, 197 F. 2d 614, concerned sufficiency of evidence under state law, not its admissibility.

expert witnesses, *res gestae*, admissibility of evidence of similar prior acts and of self-serving declarations to be applicable in equity, *Consolidated* v. *Thompson*, 14 F. Supp. 318; *Montgomery* v. *Pacific*, 293 F. 680; *United States* v. *Milwaukee*, 142 F. 247; *Sawhill* v. *Lawrence*, 69 F. 2d 194. *Cereste* v. *New York*, 231 F. 2d 50, *supra*, cited *Bouldin* v. *Massies'*, 7 Wheat. 122, 153; *Chitwood* v. *United States*, 153 F. 551, 552 and *Union* v. *Owens*, 142 F. 2d 145, 146, in support of the contention that long standing precedents in actions at law were admissible under Rule 43(a). *Harmer* v. *Gwynne*, 11 Fed. Cas., 551, 553, declared, "But the rule of law, in regard to admission of evidence, is the same at law as in chancery." In *Magniac* v. *Thomson*, 15 How. 281, 299, this Court declared that rights defined by law could not be changed or unsettled in equity. *Tallman* v. *Varick*, 5 Barb. (N. Y.) 277, held that equity follows the precedents of the courts of law and analogies furnished by the rules. See also: *Jenkins* v. *Eldredge*, 13 Fed. Cas. 462; 1 Story, Eq. Jur., § 64; Green, *Admissibility of Evidence Under Federal Rules* (1941-2), 55 Harv. L. Rev. 197, 201-202; Wigmore on Evidence, 3rd Ed., §§ 1920, 1921. That long standing rules of evidence at law have consistently been adjudged to be rules equally applicable in equity and so admissible under Rule 43(a) seems rather apparent in view of the above citations, in view of the scores of cases all citing controlling federal rules at law as coming under the Rule and in view of the fact that a restrictive ruling, due to the near absence of any equity cases on points of admissibility of evidence, would destroy the effect of conformity of the federal rules of evidence at law and recreate the very confusion that existed prior to the promulgation of the Rule and which in fact directly led to its passage.

Petitioner's point seems to be that the New York case of *Dougherty* v. *Milliken*, 163 N. Y. 527, restricted testimony of expert opinion evidence. Respondent respectfully submits that the New York rule of evidence is imma-

terial in this matter due to the applicability of Rule 43(a) of the Federal Rules but that, in any event, the rule of New York would also favor admissibility of Merriman's testimony. Petitioner disregarded the fact that *Van Wycklen* v. *City*, 118 N. Y. 424, 429; *Littlejohn* v. *Shaw*, 159 N. Y. 188, 193, cited and followed *Transportation* v. *Hope*, *supra*. The supposed modification in *Dougherty* was actually a re-affirmation that such opinion evidence was admissible when the testimony concerned a technical subject which layman jurors, without an opinion as to safety or prudent, might not be capable of understanding. No standard was established, leaving the law as it was previously, that the Trial Judge had the discretionary power to determine whether the opinion was or was not necessary to enlighten the jury. See: *Swarts* v. *Wilson*, 115 A. D. 739, aff'd 193 N. Y. 623; *German* v. *New York*, 103 A. D. 310, aff'd 185 N. Y. 581. The Trial Judge herein in his sound discretion determined that Merriman's testimony was admissible. In absence of clear error it was not reversible. *Halecki* v. *United*, 251 F. 2d 708, rev'd on other g'ds, 358 U. S. 613; *Trowbridge* v. *Abrasive*, 190 F. 2d 825.

Under any standard the Trial Judge was correct in admitting the testimony. Petitioner complains that the non-technical nature of the evidence should have demanded rejection of the testimony. The Trial Judge thought otherwise and the use by the parties of two hoists in evidence and of two expert witnesses by respondent and three expert witnesses by petitioner all on the one issue of cause of the accident, covering dozens of pages of testimony, all to explain a supposedly non-technical subject fully within the common knowledge of laymen jurors substantiates that decision.

In addition, although the question requested an opinion, it did so only on the basis of Merriman's experience and what he, as an eye-witness, actually observed.

The answer was an explanation of the internal mechanism of the hoist dealing with its highly complex operation. The question was not directed to the ultimate issue for the jury, whether petitioner failed to use due care in the design, assembly and testing of the hoist, but was addressed only to the cause of the accident.

The objection was addressed to the witness' qualifications and that it was speculative. Since Merriman's qualifications were conceded on the appeal below and the question of sufficiency of evidence has now been conceded, the basis for petitioner's objections has been laid to rest. There is no issue before this Court for decision.

Respondent submits that by any test of settled decisional law by this Court and others, by any interpretation of Rule 43(a) of the Federal Rules regarding admissibility by reason of equity rules or by the accepted view under New York law adhering to the decisions of this Court that determination of admissibility was within the sound discretion of the Trial Judge, the Court below was correct. There is no diversity of opinion by any Court. The question raised has no unusual or national importance, involving nothing more than a simple decision of admission of expert opinion evidence under Rule 43(a). It certainly requires no further statement by this Court of what has been thoroughly settled law for 83 years.

II

Expert testimony of dependency upon fabrication and testing of the material parts of the ratchet and pawl did not charge that the ratchet and pawl actually involved in the accident were defective but only that tests showed that the hoist in evidence was malfunctioning.

The similarity of the hoist in evidence with the hoist actually involved was fully proved by petitioner's expert who examined, in detail, every part of the offered hoist and then stated that it was the same, that the parts were

petitioner's parts and no different in any material aspect than the hoist concededly involved in the accident (158-162). As such, similarity established by petitioner's own witness was sufficient under the test laid down in *Lever* v. *Atlas*, 131 F. 2d 770; *Shanahan* v. *Southern*, 188 F. 2d 564; *United States* v. *Ball*, 163 U. S. 662; *Lobel* v. *American*, 205 F. 2d 927; *May* v. *Runge*, 241 F. 575; *Gaillard* v. *Boynton*, 70 F. 2d 552. Petitioner had the involved hoist in its possession or in sympathetic hands from the accident date until trial. Respondent could not obtain it nor did petitioner offer it in evidence.

In any event, no contradiction of decision has been cited by petitioner, nor has there been any showing of national importance meriting an examination of this evidentiary issue, which has been fully answered by the Court below in accordance with settled principles of law.

CONCLUSION

The writ of certiorari should be denied in accordance with the facts and law above set forth.

Dated, New York, N. Y., September 26th, 1960.

Respectfully submitted,

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